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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/651,130	08/30/2000	Kent Malmgren	010315-092	1064

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EXAMINER

CHANG, VICTOR S

ART UNIT	PAPER NUMBER
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1771

DATE MAILED: 04/08/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/651,130

Applicant(s)

MALMGREN ET AL.

Examiner

Victor S Chang

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☒ Responsive to communication(s) filed on 10 February 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1,2,4-15 and 20 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1, 2, 4-15 and 20 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

## Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

## Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Introduction***

1. The Examiner has carefully considered Applicants' amendments and remarks filed on 2/10/2005. Applicants' amendments to claim 20 has been entered.
2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
3. Rejections not maintained are withdrawn.

### ***Rejections Based on Prior Art***

4. Claims 1, 2, 4-15 and 20 are rejected under 35 U.S.C. 102(e) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Chen et al. (US 6261679), generally as set forth in section 5 of Office action dated 11/17/2004, together with the following response to argument.

With respect to Applicants' argument "Applicants assert that a prior art reference must be considered in its entirety ... the disclosure of Chen et al. ... does not anticipate the present claims, specifically the claimed range of pore sizes between 0 and 3  $\mu\text{m}$ ." (Remarks, pages 8-9, bridging paragraph), the Examiner repeats (see Office action dated 11/17/2004, page 4, top paragraph) that Chen expressly teaches that the absolute cell diameter of the cells can be about 3 mm or less (column 42, lines 26-38), as such Chen clearly anticipates the instantly claimed range of pore sizes, Applicants' argument to the contrary notwithstanding.

With respect to Applicants' argument "The simple inclusion of "or less" does not provide a disclosure of each and every pore size under 3000  $\mu\text{m}$  all the way to zero ... when read as a whole ... Chen et al. does not contemplate a pore size less than 20  $\mu\text{m}$ . This is evidenced at least by the description at column 42, lines 31-38, and because there is no discussion of a pore size smaller than 20  $\mu\text{m}$ ." (remarks, page 9, first full paragraph), the Examiner repeats that Chen expressly teaches that the absolute cell diameter of the cells can be about 3 mm or less, which clearly encompasses cell size down to zero. In particular, it should be noted that Chen also teaches several specific smaller cell diameter ranges, with decreasingly smaller cell diameters (column 42, lines 26-38), and nowhere does Chen teach that the above-mentioned teachings at column 42 limits the scope of his invention. Further, it should be noted that, in the absence of factual support, Attorney's argument cannot take place of evidence.

With respect to Applicants' argument "None of the Examples in *Chen et al.* teach methods that would appear to overcome ... difficulties in order to produce a material having pore sizes between 0 and 3  $\mu\text{m}$ ." (Remarks, page 9, second full paragraph), the Examiner first notes that the nowhere does Chen teach that the Examples limit the scope of invention. Second, the "difficulties" of the methods are not recited in any of the claims. Third, even if a proper product-by-process is recited, Applicants must show that the resultant article is patentably distinct from those taught by the reference.

With respect to Applicants' argument "*Chen et al.* does not recognize or suggest gel liquid storage or any such manner storage ... *Chen et al.* is focused simply on capillary absorption." (Remarks, page 9, bottom paragraph), the Examiner first notes

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that the manner of liquid absorption is not recited in any of the claims. Second, even if the manners of liquid absorption are recited, they are simply cell size dependent, as argued by Applicants, as such, since Chen expressly teaches that the absolute cell diameter of the cells can be about 3 mm or less, as set forth above, Chen's teaching clearly encompasses gel liquid storage of cell sizes between 0 and 3  $\mu\text{m}$  as well, Applicants' argument to the contrary notwithstanding.

With respect to Applicants' argument "the claimed range compared with the range disclosed in the prior art shows a "marked improvement", so as to be a difference in kind, rather than one of degree." (Remarks, page 11, bottom paragraph), the Examiner notes that nowhere in Applicants' response a comparison data between the instant invention and Chen's invention can be found. Again, the Examiner notes that in the absence of factual support, Attorney's argument cannot take place of evidence.

With respect to Applicant's argument "the claims are directed towards a narrow range, the claimed range must be disclosed in *Chen et al.* with sufficient specificity to constitute an anticipation" (Remarks, page 12, second full paragraph), the Examiner respectfully reminds Applicants that both independent claims 1 and 20 recite the range of cell size in a "comprising" clause, which clearly lack specificity to cell size range of 0 to 3  $\mu\text{m}$  as well. In other words, let alone that the independent claims 1 and 20 fail to recite that a substantial amount of the cell size are formed within the range of 0 to 3  $\mu\text{m}$ , the instantly claimed range also fails to exclude even a small portion of Chen's cell size range is in the range of 0 to 3  $\mu\text{m}$ , as such specificity to cell size range is clearly lacking in any of the claims, Applicants' argument to the contrary notwithstanding.

With respect to Applicants' argument "There is nothing in Chen et al. that would have motivated persons skilled in the art to modify the disclosed pore sizes of *Chen et al.* in a manner to arrive at the presently claimed range." (Remarks, page 13, third full paragraph), the Examiner notes that Applicants appear to have confused that the basis of rejection is obviousness; and respectfully reminds Applicants that the grounds of rejection is based on 35 USC 102(e)/103(a), and Chen anticipates the range of cell size as claimed.

Finally, regarding newly amended independent claim 20, which incorporates additional elements of claims dependent upon independent claim 1, the Examiner notes that since all the elements are within the same scope of claims 1, 2, 4-15, claim 20 is also rejected for the same reasoning as set forth for claims 1, 2, 4-15.

### ***Conclusion***

**5. THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Victor S Chang whose telephone number is 571-272-1474. The examiner can normally be reached on 8:30 - 5:00.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel H Morris can be reached on 571-272-1478. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

*VSC*

Victor S Chang  
Examiner  
Art Unit 1771

3/29/2005

  
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SUPERVISORY PATENT EXAMINER  
TECHNOLOGY CENTER 1700